Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

UDO BIRNBAUM,

Petitioner,

v.

RICHARD RAY; TOMMY W. WALLACE; JAMES B. ZIMMERMANN; RICHARD DAVIS; PAT MCDOWELL, JUDGE; LESLIE P. DIXON; BETTY DAVIS; WILLIAM JONES; BECKY K. MALONE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

UDO BIRNBAUM, PRO SE
540 VZ 2916
Eustace, TX 75124
(903) 479-3929

40 pp

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits use of the "Rooker/Feldman" claim preclusion doctrine to keep plaintiff from showing his cause when the pleadings and evidence shows the initiation of the state court proceedings was itself an overt act in behalf of the alleged RICO enterprise.

2. Whether 18 U.S.C. § 1964(c) ("civil RICO") permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has plead all the elements of civil RICO and brought evidence of each defendant's conduct.

THE PARTIES

The Petitioner in this action is Udo Birnbaum, Pro Se.
The Respondents are all individual persons.

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The Fifth Circuit Court of Appeals' Opinion is unpublished (Appendix A). The Dallas District Court's Finding is also unpublished (Appendix B).

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Fifth Circuit dated and entered on July 28, 2000. A timely petition for rehearing was filed on August 11, 2000, and denied on September 25, 2000. This petition was filed within ninety days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 1964(c) "civil RICO".

STATUTORY PROVISIONS

The RICO statute 18 U.S.C. § 1961 *et seq.* is voluminous. Only the relevant sections of RICO, i.e. 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1964(c) "civil RICO" are reproduced as Appendix F.

STATEMENT OF THE CASE

Petitioner Birnbaum filed suit under 18 U.S.C. § 1964(c) "civil RICO" alleging he was the victim of a scheme of entering fraudulent state court suits for the purpose of extorting legal fees, and presented a 183 paragraph 34 page petition accompanied by an affidavit with

104 exhibits detailing the scheme. The district court dismissed this cause by the granting of individual motions to dismiss under FRCP 12(b)(6) upon each defendant separately, thereby de facto dismissing the civil RICO cause.

The district court denied discovery and there never was a hearing. The question is whether it was legislative intent to allow such individual dismissals upon individual motions, or whether civil RICO requires a finding by a jury upon the totality of the evidence, including the falsities in the individual motions to dismiss.

The scheme is fully presented in Birnbaum's First Amended Complaint in the district court, not attached. The below presents the essence of that complaint in light of the evidence in the 104 exhibits, as is appropriate to a FRCP 12(b)(6) dismissal.

I. The Facts.

In the summer of 1994 an adjoining landowner by the name of William B. Jones, on his property, killed beavers, blew up their dams, drained and bulldozed the area, and went to an attorney named Richard Ray complaining of beavers. Attorney Ray, knowing that beavers did not provide him with a cause of action, proceeded to create himself a fraudulent cause of action under Section 11.086 of the Texas Water Code, alleging that Petitioner Birnbaum, as a person, had in 1994 built a dam supposedly having caused such flooding.

Neither Birnbaum nor anyone else had built such dam. Neither Jones nor anyone else had told Ray that

Birnbaum had built such dam. Jones' complaint had been about beavers.

Birnbaum appeared pro se in the state court and complained loudly about Ray's fabrications. Thereupon the whole process in the state court became a must-win conspiracy against Birnbaum for being a pro se who was speaking out about corruption in that state court. One after another the defendants abused their positions, each in their own way, fully knowing that they were facilitating a must-win conspiracy and scheme to defraud Birnbaum of honest judicial service. Ray knew from the beginning of his scheme upon Birnbaum that others could and would thus assist him.

The case came to trial May 26-29 of 1998, with the jury finding unanimously that Birnbaum had caused exactly zero damage to Jones. Ray had, however, schemed to sneak in a question about legal fees not permitted under his cause of action, and upon this fraudulent question proceeded to seek judgment against Birnbaum in the amount of $10,000 for legal fees.

The Court set hearing after hearing for "entry of judgment" against Birnbaum, but never entered nor denied judgment, leaving Birnbaum vulnerable, with the scheme still ongoing as of this date, more than two (2) years after the verdict.

II. The Proceedings Below.

On March 30, 1999, Birnbaum filed suit in the Dallas Federal Court under 18 U.S.C. § 1964(c) ("civil RICO") alleging the scheme to deprive him of honest judicial

service for the purpose of extorting legal fees from him, and naming as defendants ten (10) persons who had participated directly or indirectly in that scheme.

All defendants filed FRCP 12(b)(6) motions to dismiss claiming various types of immunity from Birnbaum's RICO claims. On September 7, 1999, without any discovery and without ever a hearing, the Magistrate issued Findings, Conclusions, and Recommendations (Appendix B) to which Birnbaum timely objected on September 17, 1999, seeking a de novo determination by the District Judge. On September 20, 1999 the District Judge, without ever a hearing, issued judgment (Appendix C) dismissing each defendant individually from the civil RICO cause, and de facto finding that there was no RICO enterprise. On October 14, 1999 Birnbaum appealed to the Fifth Circuit.

Birnbaum submitted a Brief to the Fifth Circuit upon ten (10) appeals issues to show that the RICO statute, under case law and the rules of procedure, did not allow the district judge to make a finding of the absence of a RICO violation anymore than it allowed him to make a finding that the defendants had indeed violated RICO. The issues presented were as follows:

- Whether the order from which appeal is taken in this civil RICO case is appealable based on the termination of the litigation, or whether there exists some other basis of appellate jurisdiction

- Whether Plaintiff's Complaint gave fair notice and rested on more than conclusions alone

- Whether the Defendants deceived the Court and failed to engage the issues in the plaintiff's Complaint
- Whether the Plaintiff's "Schultea" Reply was tailored to the defense of immunity and supported with sufficient precision and factual specificity to raise a genuine issue as to the illegality of the defendants' conduct at the time of the alleged acts
- Whether the Court failed to determine what the current applicable law was, and what the real facts were
- Whether the law was clearly established at the time of the alleged violations
- Whether the Court erred in using 12(b)(6) in dismissing a RICO complaint alleging intentional judicial trespassing
- Whether the Court erred in not addressing the injunctive relief sought by Plaintiff
- Whether the Magistrate did not look beyond the Defendants' lies for his Findings
- Whether the Court erred in not abiding by the rules of procedure

Without addressing any of Birnbaum's ten (10) briefing issues the Fifth Circuit on July 28, 2000 *sua sponte* found that Birnbaum's Civil RICO cause against the ten (10) defendants was, under the *Rooker/Feldman* doctrine, an impermissible collateral attack against a supposed state court judgment in the *Jones v. Birnbaum* beaver matter. (Appendix A)

In sum, the Fifth Circuit in its opinion never reached Birnbaum's appeals issue as to whether the district judge

was allowed to make the inference that there was no RICO enterprise.

And on September 25, 1999 the Fifth Circuit denied Birnbaum's petition for a rehearing (Appendix E) upon the *Rooker/Feldman* issue, an issue on which it had not been briefed, and of which the District Court had made no finding.

REASONS FOR GRANTING CERTIORARI TO QUESTION 1

I. The Appeals Court's decision that the *Rooker/Feldman* doctrine bars this civil RICO cause conflicts with the legislative intent of RICO as expressed in this Court's *Rotella v. Wood*. ("*The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general', dedicated to eliminating racketeering activity.*")

The Appeals Court, upon appeal of a FRCP 12(b)(6) dismissal, *sua sponte* made a finding (Appendix A) diametrically opposed to Birnbaum's civil RICO allegations. The entire finding (less title and citations) by the Fifth Circuit is:

> Udo Birnbaum challenges, pro se, the dismissal, for failure to state a claim under FED. R. Civ. P. 12(b)(6), of his Racketeer Influenced and Corrupt Organizations Act (RICO) complaint. Birnbaum's RICO action arises out of a state-court action brought against him by defendant William Jones. Birnbaum's action is an attempt to attack collaterally the validity of an adverse

> state-court judgment. Federal courts lack jurisdiction to engage in appellate review of state-court determinations. (citation omitted).
>
> When issues raised in a federal court are inextricably intertwined with a state judgment and the court is in essence being called upon to review the state-court decision, the court lacks subject matter jurisdiction. (citation omitted)
>
> Because Birnbaum's claims arise solely from the state-court litigation and are "inextricably intertwined" with the state court's judgment, the district court judgment is AFFIRMED.

Birnbaum's civil RICO complaint was upon a scheme to deprive of honest service, by among other acts *lack of a judgment* upon the verdict of a jury finding zero damages, so as to release him from the ongoing RICO scheme. There was not even a claim by any of the defendants that there was a state-court judgment, no appeals briefing that such existed, and certainly no finding thereof by the District Court. The Fifth Circuit just "found" such. Then, without addressing the appeals issue of whether the District Judge could make such finding as he did, i.e. the dismissal of all defendants individually, the Fifth Circuit affirmed such without any reference whatsoever to the subject matter of the District Court's finding.

But even assuming that such a state-court judgment existed, which it does not, the issues in the state-court were entirely different from those in the federal civil RICO cause. At issue in the state-court *Jones v. Birnbaum* was whether Jones was damaged by flooding. At issue in the civil RICO cause was whether there was an illicit

RICO scheme among ten (10) defendants, and whether Birnbaum was damaged by such scheme.

The Fifth Circuit quoted *Liedtke*, 18 F.3d 315 (5th Cir. 1994), to support its finding. But *Liedtke* itself states just exactly why the *Rooker/Feldman* doctrine does not apply to a civil RICO cause, namely because RICO itself specifically provides a cause of action:

> Absent specific law otherwise providing, that doctrine [*Rooker/Feldman*] directs that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. Constitutional questions arising in state proceedings are to be resolved by the state courts. If a state trial court errs the judgment is not void, it is to be reviewed and corrected by the appropriate state appellate court. The casting of a complaint in the form of a civil rights action cannot circumvent this rule, as absent a specific delegation "federal district court[s], as court[s] of original jurisdiction, lack [ ] appellate jurisdiction to review, modify, or nullify final order[s] of state court[s]." *Liedtke v. State Bar of Texas*, 18 F.3d 315 (5th Cir. 1994).

RICO is not a *"constitutional question"*. Neither is it a *"civil rights action"*, nor a new theory of recovery upon *"errors"*. It is statutory law (18 U.S.C. § 1961 *et. seq.*) *"specifically providing"* how, where, and upon what issue a plaintiff shall be heard:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

> enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c).
>
> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. 18 U.S.C. § 1962(d).
>
> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. (18 U.S.C. § 1964(c), "civil RICO").

But even assuming that such a judgment existed, which it does not, the *Rooker/Feldman* doctrine does not apply to this civil RICO cause, for the federal court would not have to *"review, modify, or nullify"* any *"final order[s] of state court[s]"* upon the beaver matter. *Liedtke v. State Bar of Texas*, 18 F.3d 315 (5th Cir. 1994).

The cause of action, the issues, the operative facts, and the defendants are entirely different. Additionally, the absence of any judgment in *Jones v. Birnbaum* is itself alleged to be an overt act in furtherance of the enterprise, and plaintiff's appeal is upon FRCP Rule 12(b)(6) dismissals and all allegations are to be accepted as true and viewed in light most favorable to the plaintiff, including the allegation that there is no state court judgment.

II. Whether 18 U.S.C. § 1964(c) "civil RICO" permits the use of the *Rooker/Feldman* doctrine to keep a plaintiff from showing his cause is an important issue of federal Law that this Court should establish

The congressional objective in enacting RICO is clear. This Court, in comparing civil RICO to the Clayton Act, found that:

> "Both statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into **prosecutors, "private attorneys general"**, dedicated to eliminating racketeering activity. *Klehr*, 521 U.S., at 187 (citing *Malley-Duff* at 151)(civil RICO specifically has a "further purpose [of] encouraging potential private plaintiffs diligently to investigate"). The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity, an object pursued the sooner the better." *Rotella v. Wood*, SC 98-896 Feb. 23, 2000.

The Appeals Court's decision that the *Rooker/Feldman* doctrine bars this civil RICO cause conflicts with the legislative intent of the RICO of encouraging "private attorneys general". Whether the *Rooker/Feldman* doctrine, or any other doctrine, can be used to oppose the congressional empowerment of such "private attorneys general" is an important issue of Federal Law that this Court should address.

REASONS FOR GRANTING CERTIORARI TO QUESTION 2

I. The Appeals Court's decision to affirm the granting of individual FRCP Rule 12(b)(6) motions to dismiss upon claims of immunity conflicts with this Court's opinion in *Crawford-El.* (*"This Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action"*)

The district judge erred when he strayed from the Plaintiff's cause of action under the RICO statute, *i.e.* damage by a RICO enterprise, and instead granted individual 12(b)(6) motions to dismiss based on claim of individual immunity upon their individual version of the facts. Each defendant's individual act, if looked at in isolation, may well appear "objectively reasonable", but RICO is clearly established law and immunity is merely a defense as established by this Court's *Crawford-El v. Britton,* 523 U.S 574 (1998):

> Since *Harlow's* holding related only to the scope of the affirmative defense, it provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation. *Crawford-El,* 523 U.S. 574 (1998)
>
> [T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action. *Crawford-El,* 523 U.S. 574 (1998) quoting *Gomez.* 446 U.S., at 640 (1980)

This RICO scheme is not visible by looking at only one defendant. That is why conspirators have other conspirators do their dirty work for them, each in their own way, each making their acts appear "objectively reasonable". But the jury is entitled to infer upon each defendant's connection with the other defendants and the

entire scheme. Furthermore, the jury can also find upon the falsity of the explanations put forward by a defendant, as shown by this Court's recent *Reeves* decision, which although an age discrimination case, squarely addresses the role of the jury:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [employer] was dissembling to cover up a [discriminatory] purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. *Reeves v. Sanderson Plumbing*, Supreme Court 99-536 (June 12, 2000), quoting *Wright v. West*, 505 U.S. 277, 296 (1992)

Plaintiff Birnbaum has alleged a pattern of defrauding of honest service, each defendant participating in his own particular way:

> Each such Defendant acted in violation of clear and specific constitutional or statutory provisions, for which they are properly liable. Regarding each predicate act or setting, each such Defendant participated as indicated there, each in their individual capacity, in behalf of the alleged enterprise, by not acting in their judicial, prosecutorial, administrative, or executive capacity, as would have been appropriate under the circumstances and in accordance with the oath of their Offices or duties of their positions. Plaintiff's First Amended Complaint, paragraph 26.

Such schemes to defraud of honest service have been clearly outlawed by the Fifth Circuit's *Brumley*, 116 F.3d

728, 733 (5th Cir. 1997), decision and held violative of RICO:

> In 1997, the Fifth Circuit, sitting en banc, held that, by enacting [18 U.S.C.] § 1346, Congress intended to protect the intangible right of honest services from wire fraud schemes by state actors. See *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) ("fraud statutes cover the deprivation of intangible rights."). *Brown vs. Nationsbank*, 188 F.3d 579 (5th Cir. 1999).
>
> Stated another way, "honest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interest of the employer – or that he consciously contemplated or intended such actions. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997)

II. Whether 18 U.S.C. § 1964(c) "civil RICO" permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has plead all the elements of civil RICO and brought evidence of each defendant's conduct is an important Issue of Federal Law that this Court should establish

Birnbaum is seeking review of the District Court judgment granting the defendants' individual FRCP 12(b)(6) motions to dismiss, and the de facto dismissal of the civil RICO complaint in such manner.

> "A district court's dismissal of a complaint under this subsection may be upheld only if, taking the plaintiff's allegations as true, it appears that no relief could be granted based on the plaintiff's alleged facts." *Bass v. Parkwood*

> *Hosp.*, 180 F.3d 234, 240 (5th Cir. 1999), citing *Bradley v. Pucket*, 157 F.3d 1022, 1025 (5th Cir. 1998). "All well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995).

Birnbaum averred fraudulent documents and their use in a scheme to extort Birnbaum, and provided the documents themselves as 104 exhibits. Birnbaum has also alleged that all the defendants claiming absolute immunity were in fact trespassers upon him, and therefor stripped of immunity, because of their prior agreement. "All were secret agents in behalf of the enterprise and trespassers upon Birnbaum". (First Amended Complaint, par. 26)

There are, however, different levels of "fact" in a RICO environment. RICO itself legislates the material issues which sets the material facts. Below this, however, are the underlying evidentiary "facts" as to exactly what each defendant did. But then there is also the issue as to whether the individual acts constitute "predicate acts", a "pattern of racketeering activity", and an "enterprise", etc. Then there is the issue of fact of whether a certain defendant participated in a certain prohibited manner, i.e. whether he "conducted or participated in the conduct", etc. Then of course there is the issue of whether the Plaintiff was damaged by a violation of RICO.

At issue is whether the Court under a 12(b)(6) motion is required to view the allegations upon these "principal facts" also in light most favorable to the plaintiff. If it is, i.e. if it at least accepts the possibility that the plaintiff could convince a jury, then these "principal facts" are to

be accepted as true also. And if the plaintiff has properly pleaded the elements of a RICO case, then as a matter of law the defendants have violated RICO. It is that simple.

Case law tells district court trial judges, that unlike the jury, he is not allowed to draw inferences like a jury is allowed to. Case law also tells him that whether an issue needs to go to a jury turns on whether it presents a proper jury question. RICO violation is a jury question. Case law also tells the judge that he, unlike the jury, is not entitled to draw inferences from any of the documentary evidence in front of him either. Case law also tells him that summary judgment on affidavits is inappropriate when state of mind is involved, as it surely is in RICO.

Plaintiff supplemented his 183 paragraph pleading with 104 exhibits upon the averments therein. If the Court viewed all allegations as true, particularly in light of the additional inferences upon the 104 exhibits, then the defendants violated RICO, and individual FRCP 12(b)(6) dismissals are not proper.

The district judge erred when he strayed from the Plaintiff's cause of action and granted individual 12(b)(6) motions to dismiss based on claim of individual immunity upon their individual version of the facts. Immunity is merely a defense, but is not relevant to Plaintiff's Rico cause of action upon the defendants' scheme.

The Appeals Court's decision to affirm the granting of individual FRCP Rule 12(b)(6) motions to dismiss upon claims of immunity conflicts with this Court's opinion in *Crawford-El.*

Which dispositive rules of procedure, if any, can be used to preclude the showing of a civil RICO cause to a jury is an important issue of Federal Law that this Court should establish.

CONCLUSION

The legislative intent of Civil RICO is to encourage victims to turn into "private attorneys general" dedicated to eliminating racketeering activity. *(Rotella)*. A jury can find for a plaintiff upon the falsity of the explanations put forward by a defendant. *(Reeves)*. Immunity is not relevant to the existence of the plaintiff's cause of action. *(Crawford-El)*. RICO conspiracies are dangerous and punishable in themselves. *(Salinas)*.

Which doctrines, if any, and which dispositive rules of procedure, if any, can keep a civil RICO "private attorney general", having "diligently investigated" *(Rotella)*, from showing his cause to a jury is an important issue of Federal Law that this Court should resolve.

Birnbaum respectfully requests that this Court grant the petition for writ of certiorari to resolve this issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11180
Summary Calendar

UDO BIRNBAUM,

Plaintiff-Appellant,

versus

RICHARD RAY; ET AL.,

Defendants,

RICHARD RAY; TOMMY W. WALLACE; JAMES B. ZIMMERMAN; RICHARD DAVIS; PAT MCDOWELL, Judge; LESLIE P. DIXON, BETTY DAVIS; WILLIAM JONES; BECKY K. MALONE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:99-CV-696-R)
(Filed Jul. 28, 2000)

Before WIENER, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Udo Birnbaum challenges, *pro se*, the dismissal, for failure to state a claim under FED. R. CIV. P. 12(b) (6), of his Racketeer Influenced and Corrupt Organizations Act (RICO) complaint.

Birnbaum's RICO action arises out of a state-court action brought against him by defendant William Jones. Birnbaum's action is an attempt to attack collaterally the validity of an adverse state-court judgment. Federal courts lack jurisdiction to engage in appellate review of state-court determinations. ***District of Columbia Court of Appeals v. Feldman***, 460 U.S. 462, 476, 482 (1983); ***Rooker v. Fidelity Trust Co.***, 263 U.S. 413, 415 (1923); ***Liedtke v. State Bar of Texas***, 18 F.3d 315, 317 (5th Cir. 1994). "When issues raised in a federal court are inextricably intertwined with a state judgment and the court is in essence being called upon to review the state-court decision, the court lacks subject matter jurisdiction". ***Davis v. Bayless***, 70 F.3d 367, 375 (5th Cir. 1995) (internal quotation marks and citations omitted).

Because Birnbaum's claims arise solely from the state-court litigation and are "inextricably intertwined" with the state court's judgment, the district court judgment is

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circmstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM, Plaintiff,	§	
vs.	§	No. 3:99-CV-0696-R
RICHARD L. RAY, et al, Defendants.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

(Filed Sept. 7, 1999)

Pursuant to 28 U.S.C. § 636(b) and respective Orders of Reference, the following motions are before this Court for consideration:

1. *Defendants Tommy W. Wallace, James B. Zimmerman, Pat McDowell, and Leslie P. Dixon's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 26, 1999;

2. *Defendant Richard Davis' Motion to Dismiss Under Rule 12 (b)(6, Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading*

and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings, filed April 28, 1999;

3. *Defendant Betty Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 30, 1999;

4. *Defendant Richard Ray's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading,* filed April 30, 1999;

5. *Defendant William Jones' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading,* filed April 30, 1999;

6. *Defendant Becky Malone's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed May 7, 1999;

7. *Plaintiff's Motion for Leave to File Amended Complaint,* filed July 19, 1999; and

8. *Defendants Zimmerman, Wallace, McDowell, and Dixon's Amended Motion to Dismiss under Rule 12 (b)(6), Alternatively under Rule 56 for Summary Judgment, Alternatively for Abatement of this Action Including Discovery by Plaintiff until the Court has Determined the Issue of Absolute Judicial and Prosecutorial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed July 16, 1999.

No hearing is necessary on the matter. Based upon arguments in the various Motions and Responses thereto, this Court finds as follows.

FINDINGS AND CONCLUSIONS

As an initial matter, this Court finds that *Plaintiff's Motion for Leave to File Amended Complaint,* filed July 19, 1999, should be granted. However, this Court finds that even accepting the Amended Complaint, Plaintiff can not overcome the immunity issues addressed by certain Defendants in their respective arguments for dismissal and fails to state a claim on which relief can be granted for certain other Defendants addressed in their respective arguments.

Judicial Immunity

Defendants James B. Zimmerman, Tommy W. Wallace, Pat McDowell Leslie P. Dixon, Richard Davis, Betty Davis and Becky Malone move for dismissal on grounds

of judicial immunity. A judge is entitled to absolute judicial immunity from liability for damages for judicial acts performed within his or her jurisdiction. *See Pierson v. Ray*, 386 U.S. 547, 553-54, 87 S. Ct. 1213, 1217 (1967); *Mays v. Sudderth*, 97 F.3d 107, 110 (5th Cir. 1996); *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986).

In determining whether a judge's action were "judicial in nature," the federal courts consider whether (1) the precise act complained of is a normal judicial function; (2) the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) the controversy centered around a case pending before the court; and (4) the acts arose directly out of a visit to the judge in his official capacity. *See Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). These four factors are broadly construed in favor of immunity, and the absence of one or more factors does not prevent a determination that judicial immunity applies in a particular case. *See Malina*, 994 F.2d at 1124.

Defendants Tommy W. Wallace, James Zimmerman and Pat McDowell move for dismissal on judicial immunity grounds. The Plaintiff's claims against these Defendants all derive from their service as judges in Plaintiff's case and their actions during the court proceedings. Even considering Plaintiff's Amended Complaint, there are no specific facts and no proper evidence showing that Judges Zimmerman, Wallace, or McDowell, have ever engaged in any act or omission regarding Plaintiff outside the course and scope of their official duties as judicial officers. In fact, even Plaintiff's Amended Complaint

presents nothing more than conclusory Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, violations which do not present this court with proper factual allegations to find the Judges' actions against the Plaintiff to have been outside the scope of their official capacity.

Defendant Richard Davis also moves for dismissal on judicial immunity grounds because all of Plaintiff's claims against him derive from his service as a court appointed mediator in Plaintiff's case and his actions, therefore, were as an "arm of the court." *See Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S. Ct. 1108, 1115 (1983). Specifically, the only acts Plaintiff argues against Davis are conclusory violations of RICO. Plaintiff alleges no specific facts and has proffered no evidence, demonstrating that defendant Davis has ever engaged in any act or omission with regard to Plaintiff except while acting within the course and scope of his official duties as a court-appointed mediator. Accordingly, this Court finds that Defendant Richard Davis' Motion to Dismiss should be granted.

Likewise, Defendant Betty Davis moves this Court for dismissal on judicial immunity grounds because all of Plaintiff's claims against him derive from her performance as a court coordinator. Again, as was the case with Defendant Richard Davis, the only acts Plaintiff alleges against Defendant Betty Davis are mere conclusory violations of RICO. Plaintiff alleges no specific facts and has proffered no evidence, demonstrating that Defendant Betty Davis has ever engaged in any act or omission with regard to Plaintiff except while acting within the course and scope of her official duties as a court coordinator.

Accordingly, this court finds that Defendant Betty Davis' Motion to Dismiss should be granted.

Similar to Defendant Richard Davis and Betty Davis, Defendant Becky Malone also moves for dismissal on judicial immunity grounds because all of Plaintiff's claims against her derive from her performance as a court reporter. Again, the only acts Plaintiff alleges against Defendant Becky Malone are mere conclusory violations of RICO. Plaintiff alleges no specific facts and has proffered no evidence, demonstrating that Defendant Becky Malone has ever engaged in any act or omission with regard to Plaintiff except while acting within the course and scope of her official duties as a court reporter. Thus, this Court finds that Defendant Becky Malone's Motion to Dismiss should be granted.

Prosecutorial Immunity

Defendant Leslie Dixon is a district attorney and moves for dismissal on grounds of prosecutorial immunity. According to the United States Supreme court, a "prosecutor enjoys absolute immunity from civil suit for damages in initiating a prosecution and presenting the State's case. *See Imbler v. Pactman,* 424 U.S. 409 (1976). Plaintiff Birnbaum alleges that Dixon lied in court. Even assuming arguendo that Dixon faced liability, Plaintiff offers no specificity as to what Dixon lied about, nor evidence to support his allegations.

Failure to State a Claim

Defendant William Jones moves for dismissal for Plaintiff's failure to state a claim against him. Plaintiff's claims against Defendant Jones, even considering his Amended Complaint, do not contain even a single fact which would support the allegation that Defendant Jones did in fact enter into any conspiracy. Therefore, this Court recommends that Defendant William Jones' Motion to Dismiss should be granted.

Defendant Richard Ray who was Defendant William Jones' attorney in the litigation between Plaintiff and Defendant Ray also moves for dismissal for Defendant's failure to state a claim against him. The Plaintiff claims Defendant Ray was involved in a conspiracy in violation of RICO. Again, neither Plaintiff's Complaint nor Amended Complaint allege facts to support Plaintiff's allegation against Defendant Ray. This Court recommends Defendant Richard Ray's Motion to Dismiss be granted.

RECOMMENDATION

Based on the foregoing, this Court initially recommends that *Plaintiff's Motion for Leave to File Amended Complaint,* filed July 19, 1999, **be granted.** This Court further recommends that *Defendant Tommy W. Wallace, James B. Zimmerman, Pat McDowell, and Leslie P. Dixon's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants'*

Motion for Dismissal on the Plaintiff's Pleadings, filed April 26, 1999, **be granted;** *Defendant Richard Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 28, 1999, **be granted;** *Defendant Betty Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed April 30, 1999, **be granted;** *Defendant Richard Ray's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies with the Rules of Pleading,* filed April 30, 1999, **be granted;** *Defendant William Jones' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading,* filed April 30, 1999, **be granted;** *Defendant Becky Malone's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings,* filed May 7, 1999, **be granted;** and *Defendants Zimmerman, Wallace, McDowell, and Dixon's Amended*

Motion to Dismiss under Rule 12 (b)(6), Alternatively under Rule 56 for Summary Judgment, Alternatively for Abatement of this Action Including Discovery by Plaintiff until the Court has Determined the Issue of Absolute Judicial and Prosecutorial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings, filed July 16, 1999, **be denied as moot.**

SO RECOMMENDED this 7 day of September, 1999.

/s/ Paul D. Stickney
PAUL D. STICKNEY
United States
Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM, Plaintiff,	§	
vs.	§	No. 3:99-CV-0696-R
RICHARD L. RAY, et al, Defendants.	§	

JUDGMENT

(Filed Sep. 21, 1999)

The Court has heretofore entered its Findings in this case, and it is therefore

ORDERED, ADJUDGED, AND DECREED that Plaintiff Udo Birnbaum's *Motion for Leave to Amend Complaint* is **GRANTED** and

1. *Defendants Tommy W. Wallace, James B. Zimmerman, Pat McDowell, and Leslie P. Dixon's Motion to Dismiss Under Rule 12(b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings;*

2. *Defendant Richard Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with*

the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings;

3. *Defendant Betty Davis' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings;*

4. *Defendant Richard Ray's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading;*

5. *Defendant William Jones' Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff Until Plaintiff Complies With the Rules of Pleading;*

6. *Defendant Becky Malone's Motion to Dismiss Under Rule 12 (b)(6), Alternatively Under Rule 7 (a) FRCP "Shultea" for Abatement of this Action Including Discovery by Plaintiff until Plaintiff Complies with the Rules of Pleading and the Court has Determined the Issue of Absolute Judicial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings*

are **GRANTED** and *Defendants Zimmerman, Wallace, McDowell, and Dixon's Amended Motion to Dismiss under Rule 12 (b)(6), Alternatively under Rule 56 for Summary*

Judgment, Alternatively for Abatement of this Action Including Discovery by Plaintiff until the Court has Determined the Issue of Absolute Judicial and Prosecutorial Immunity as Raised in Defendants' Motion for Dismissal on the Plaintiff's Pleadings is **DENIED AS MOOT.**

SO ORDERED this 20 day of September, 1999.

/s/ Jerry Buchmeyer
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UDO BIRNBAUM,	§	
Plaintiff,	§	
	§	
VS.	§	**No. 3:99-CV-0696-R**
RICHARD L. RAY, et. al.,	§	
	§	
Defendants.	§	

ORDER

(Filed Sep. 27, 1999)

The PLAINTIFF'S OBJECTIONS TO FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE (filed September 17, 1999) are without merit, and they are OVERRULED.

ENTERED: SEPTEMBER 24, 1999

/s/ Jerry Buchmeyer
JERRY BUCHMEYER,
CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-11180

UDO BIRNBAUM

Plaintiff-Appellant

v.

RICHARD RAY; ET AL

Defendants

RICHARD RAY; TOMMY W WALLACE; JAMES B ZIMMERMANN; RICHARD DAVIS; PAT MCDOWELL, Judge; LESLIE P DIXON; BETTY DAVIS; WILLIAM JONES; BECKY K MALONE

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(Filed Sep. 25, 2000)

Before WIENER, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

The alternative request for a stay of the mandate is DENIED.

ENTERED FOR THE COURT:

/s/ Barksdale
United States Circuit Judge

APPENDIX F

STATUTORY PROVISIONS

18 U.S.C. § 1961, et. seq. ("RICO") provides, in relevant part:

18 U.S.C. § 1962(c):

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(d):

"It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1964(c), "Civil RICO":

"Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.